

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

RACHEL EVANS, ET AL., PETITIONERS

v.

CARLA A. HILLS, SECRETARY OF HOUSING AND  
URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION

ROBERT H. BORK,  
*Solicitor General,*

REX E. LEE,  
*Assistant Attorney General,*

LEONARD SCHAITMAN,  
ANTHONY J. STEINMEYER,  
*Attorneys,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

In the Supreme Court of the United States

OCTOBER TERM, 1976

---

No. 76-601

RACHEL EVANS, ET AL., PETITIONERS

v.

CARLA A. HILLS, SECRETARY OF HOUSING AND  
URBAN DEVELOPMENT, ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

---

BRIEF FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION

---

OPINIONS BELOW

The opinion of the court of appeals on rehearing *en banc* (Pet. App. A1-A50) is reported at 537 F. 2d 589. The opinion of the original panel of the court of appeals (Pet. App. A51-A87) is reported at 537 F. 2d 571. The opinion of the district court (Pet. App. A89-A100) is reported at 376 F. Supp. 327.

JURISDICTION

The judgment of the court of appeals *en banc* was entered June 4, 1976. On August 18, 1976, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to November 1, 1976. The petition was filed on October 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether lower-income, minority individuals have standing to challenge the award of federal sewer and recreational grants to a town, in which they do not live and where they have never sought to live, on the ground that the town's zoning ordinance and housing policies result in the exclusion of individuals such as themselves.

### CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2, Clause 1 of the Constitution in pertinent part provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States \* \* \* [and] to Controversies to which the United States shall be a party \* \* \*.

### STATEMENT

Petitioners, four low- or moderate-income minority residents of Westchester County, New York, brought this action in the United States District Court for the Southern District of New York, alleging, *inter alia*, that the federal respondents violated the Fifth Amendment and the Civil Rights Acts of 1964 (78 Stat. 252, as amended, 42 U.S.C. 2000d) and 1968 (82 Stat 81, 42 U.S.C. 3601 *et seq.*) by approving federal sewer and recreational grants to the town of New Castle, New York (Pet. 3; C.A. App. 12a-14a).<sup>1</sup>

New Castle is a suburban community in Westchester County. In 1969, acting through the specially organized King-Greeley Sanitary Sewer District, New Castle requested aid from the Department of Housing and Urban

---

<sup>1</sup>"C.A. App." refers to the Joint Appendix filed in the court of appeals, a copy of which is being lodged with the Court.

Development for construction of a sanitary sewer system pursuant to the Community Facilities and Advance Land Acquisition Program, 79 Stat. 490, as amended, 42 U.S.C. (Supp. V) 3102 (Pet. App. A90).<sup>2</sup> The King-Greeley district is approximately one square mile in area, is almost entirely developed, and is zoned for residential use on one-quarter and one-half acre parcels and for commercial use (C.A. App. 46a-47a). The then-existing sewage disposal system, which consisted of cesspools and septic tanks, had become inadequate, and seepage constituted a public health hazard (C.A. App. 48a).

HUD approved a grant of \$358,000 for the sewer project (Pet. App. A68-A69). In evaluating the grant application, HUD employed a rating system based upon various factors such as financial need, housing considerations, health, and job and business opportunities (C.A. App. 222a). Based upon New Castle's shortage of low-income housing, it received a zero in one category (C.A. App. 189a, 228a). Nevertheless, the overall rating was sufficient, although just barely so, to obtain the award (C.A. App. 151a, 176a).<sup>3</sup> In receiving the grant, King-Greeley executed an assurance of its compliance with HUD's regulations under the Civil Rights Act of 1964 (C.A. App. 76a).

New Castle was also awarded a grant from the Department of Interior pursuant to the Land and Water Conservation Fund Act of 1965, 78 Stat. 900, as amended,

---

<sup>2</sup>This program has since been superseded by the block grant community development program established by the Housing and Community Development Act of 1974, 88 Stat. 633, 652, as amended, 42 U.S.C. (Supp. V) 5301, 5316.

<sup>3</sup>The original rating sheet for the King-Greeley application was lost (C.A. App. 220a). The rating sheet was reconstructed by the HUD area official who had prepared the original. He testified that the scores awarded on the reconstructed rating sheet were identical to those on the original (C.A. App. 191a-192a).

16 U.S.C. (Supp. V) 4601-8, to assist in developing as a recreational area the 38 acre Turner Swamp, a marshy area unsuited for housing development (Pet. App. A90; C.A. App. 52a-53a). As a condition of receiving the grant, New Castle gave its assurance that no person would be denied the benefits of the Turner Swamp program on grounds of race (Pet. App. A97, n. 6; C.A. App. 77a).

The Suburban Action Institute suggested that both federal agencies disapprove their respective grants because of New Castle's allegedly discriminatory housing policies (C.A. App. 30a). The agencies reviewed the matter and determined there was no basis for halting the grants (Pet. App. A90-A91; C.A. App. 118a-122a).<sup>4</sup>

Petitioners then instituted this action, purporting to represent all black or Spanish-speaking residents and all low- or moderate-income residents of Westchester County "who are denied the opportunity to share in Federal benefits extended to the Town of New Castle as a result of the zoning, housing and land use practices engaged in by the Town" (C.A. App. 6a). They sought to enjoin the federal agencies from supplying funds pursuant to their grants. Following discovery, the district court found that petitioners had not alleged or shown either that the award of the sewer and recreation grants to New Castle would injure them or that enjoining the two grants would alleviate the

alleged deprivation of housing opportunities (Pet. App. A96); the court thereupon dismissed the complaint, holding that petitioners lack standing (Pet. App. A89-A100).

A panel of the court of appeals initially reversed the district court's decision (Pet. App. A51-A87); however, upon rehearing *en banc*, the court affirmed the dismissal of the complaint (Pet. App. A1-A50). Relying primarily upon *Warth v. Seldin*, 422 U.S. 490, which had been decided after the original panel's decision, the court held that petitioners had failed to allege a sufficiently concrete injury to entitle them to invoke judicial resolution of the dispute (Pet. App. A4-A5; footnote omitted):

[Petitioners] do not reside in the Town. They make no claim that they have ever sought or been refused housing in the Town. They have no interest in any Town property, or connection with any past or proposed housing project in the Town. They do not allege that either of the challenged projects will discriminate against them. They make no claim that the federal funds were diverted from any actual or proposed housing project that could have been of benefit to them. In short, they allege no specific, personal, adverse results whatsoever from the grants for sewer and park construction.

#### ARGUMENT

The issue presented here involves only an application of the settled principles of standing to the facts of this case. The court below correctly applied those principles, and its decision does not conflict with that of any other circuit. Moreover, the case has lost its practical significance because both of the projects at issue have been completed and both grants have been paid, except for a small balance on the

---

<sup>4</sup>In the course of that investigation, a regional HUD official reviewed the rating sheet for the King-Greeley project and concluded that the rating should have been lower in the category of financial need (C.A. App. 172a-176a). Although the project would not have been funded originally with this lower rating, HUD determined that there was no basis for cancelling the outstanding grant (C.A. App. 176a-179a). Steps were taken, however, to improve training of the area HUD personnel who performed the financial ratings (C.A. App. 180a).

sewer grant that has been withheld pending a final audit.<sup>5</sup> In addition, the statutory program under which the sewer grant was made has been superseded by a program that prescribes a new standard for review of grant applications.

1. In *Warth v. Seldin*, 422 U.S. 490, this Court held that low-income minority residents of one city, Rochester, New York, lacked standing to challenge a zoning ordinance of an adjacent community, Penfield, New York. The Court stated that to establish standing in such a case, a plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention" (422 U.S. at 508; emphasis in original). Similarly, in *Simon v. Eastern Kentucky Welfare Rights Organization*, No. 74-1124, decided June 1, 1976, (slip op. 11; footnote omitted), the Court observed that "when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." Accord: *Singleton v. Wulff*, No. 74-1393, decided July 1, 1976.

<sup>5</sup>The federal respondents voluntarily withheld disbursement of the two grants while the case was pending in the district court (Pet. App. A90). Following that court's dismissal order and the denial of a stay pending appeal by the court of appeals, however, the grants were released. In its brief in the court of appeals, on rehearing *en banc*, New Castle stated that the Turner Swamp project had been completed, that the grant from the Department of Interior had been paid in full, that the sewer project had been virtually completed, and that the HUD grant had been paid except for a small balance. Brief for Intervenor-Appellee on Rehearing En Banc at 49, n. See also New Castle's Brief in Opposition at 11. We are advised by HUD and New Castle that the sewer project has now been completed, although a small amount of the grant remains unpaid.

Petitioners here have not made such a showing. To the contrary, they have stipulated that none of them has ever sought housing in New Castle (C.A. App. 85a),<sup>6</sup> they do not allege that the two grants to New Castle deprived them of any actual housing opportunities (C.A. App. 11a-12a), and they have not shown how a denial of funds to New Castle would inure to their benefit. As the court of appeals stated, "appellants have failed to allege *any facts whatsoever* indicative of injury suffered by them as a result of the grants to the District and the Town" (Pet. App. A15; emphasis in original).

Petitioners cannot demonstrate that the relief they sought—an injunction preventing payment of the sewer and recreational grants to New Castle—would have alleviated their housing situation. Since petitioners do not allege that the two grants deprived them of any housing opportunities, "there is even less likelihood in this case [than in *Warth*] that an injunction restraining the federal agencies would result in any betterment of [petitioners'] housing status in the County" (Pet. App. A15-A16).

The view of the dissenting judges below that the two grants might injure petitioners by perpetuating racially and economically concentrated residential patterns (Pet. App. A34-A37) is contrary to the record. Turner Swamp is unsuited for residential development, and petitioners do not claim that it could be developed for any use other than the proposed recreational open space (Pet. App. A36, n. 15).

<sup>6</sup>Rachel Evans, the only petitioner whose deposition was taken, stated that she resides in decent, integrated public housing and that she does not intend to seek other housing (C.A. App. 65a). She further stated that she does not know the area known as King-Greeley and that she does not know where Turner Swamp is located (C.A. App. 65a-66a). She objects to the two grants on the ground that federal assistance should not be given to wealthy communities (C.A. App. 67a).

Petitioners produced an affidavit stating that the King-Greeley sewer as planned will not have the capacity to serve a high-density population (Pet. App. A36; C.A. App. 30a).<sup>7</sup> However, the area to be served by the sewer is already developed, has little capacity for new buildings, contains multi-family housing and most of the area residents are lower- and middle-income persons (C.A. App. 46a-50a). Thus, the majority of the court below correctly held that petitioners have not been injured by either of the two grants at issue, and that the relief requested would not benefit them.

This result is not altered by the fact that petitioners base their claim upon the Civil Rights Acts of 1964 and 1968. The court below recognized (Pet. App. A10) that the Civil Rights Act of 1968 defines "standing as broadly as is permitted by Article III of the Constitution." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209. Nonetheless, "Art[icle] III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself \* \* \*." *Warth v. Seldin, supra*, 422 U.S. at 501. Petitioners have not satisfied this requirement with respect to the approval of the sewer and recreational grants.

2. The disagreement regarding the two grants has lost its practical significance. Both projects have been completed, and the two grants have been paid, except for a small amount of the sewer grant (see note 5, *supra*).

Moreover, the statutory program pursuant to which the sewer grant was made, 42 U.S.C. (Supp. V) 3102, has been superseded by the block grant community development program created by the Housing and Community Development Act of 1974, 88 Stat. 633, 652 as amended, 42 U.S.C. (Supp. V) 5301, 5316. Cf. *Hills v. Gautreaux*, 425 U.S. 284, 303-305. One of the numerous objectives of the new block grant program is "the spatial deconcentration of housing opportunities for persons of lower income \* \* \*." 42 U.S.C.

(Supp. V) 5301(c)(6). To obtain a grant, a community must, *inter alia*, submit a housing assistance plan that includes an assessment of the housing needs of low-income persons residing in or expected to reside in the community. 42 U.S.C. (Supp. V) 5304(a)(4)(A); 24 C.F.R. 570.303(c). The plan also must specify an annual goal for the number of dwelling units or persons to be assisted and indicate the general locations of lower-income housing. 42 U.S.C. (Supp. V) 5304(a)(4)(B) and (C). The Secretary is authorized to disapprove a grant application if the applicant's description of its community and housing needs and objectives is "plainly inconsistent" with generally available facts and data or if the activities to be undertaken with the proposed grant are "plainly inappropriate to meeting the needs and objectives identified by the applicant \* \* \*." 42 U.S.C. (Supp. V) 5304(c). Cf. *City of Hartford v. Town of Glastonbury*, C.A. 2, Nos 76-6049, 76-6050, 76-6059, decided December 23, 1976. Thus, the block grant program sets forth in detail a new congressionally prescribed method for meeting the kind of concerns that underlie petitioners' claims in this case.

#### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

ROBERT H BORK,  
*Solicitor General.*

REX E. LEE,  
*Assistant Attorney General.*

LEONARD SCHAITMAN,  
ANTHONY J. STEINMEYER,  
*Attorneys.*

JANUARY 1977.